

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1065

To be argued by
JONATHAN J. SILBERMANN

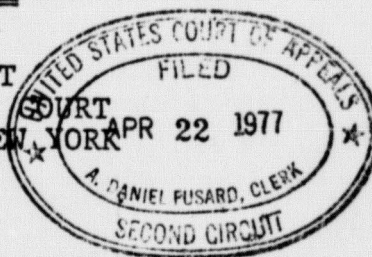
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
JOHN TARKO and
:
ROBERT E. MYLAN,
:
Defendants-Appellants.
:
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Docket No. 77-1065
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BRIEF FOR APPELLANT
ROBERT E. MYLAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the evidence seized from appellant Mylan's automobile should have been suppressed because the affidavit upon which the search warrant and seizure were based was insufficient to establish probable cause, since it did not disclose the basis for the unnamed informant's conclusion that stolen checks would be found in the car.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered on February 7, 1977, convicting appellant Robert E. Mylan, after a plea of guilty, of possessing a stolen United States Treasury check, in violation of 18 U.S.C. §§641, 2, and sentencing him to seven years' imprisonment. Appellant Mylan remains released on bail pending this appeal.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel to Mr. Mylan on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On June 1, 1976, the FBI requested issuance of a warrant authorizing the search of an automobile owned by appellant Robert E. Mylan. This application was based on an affidavit prepared by FBI Agent Eugene L. Crouch.¹

In the affidavit, Agent Crouch asserted that he had "reason to believe" that stolen Government checks worth \$280,000

¹The affidavit is reproduced as C to the separate appendix to appellant Mylan's brief.

were concealed in a 1975 Lincoln automobile bearing New Jersey license plate number 777CYS. This belief was based on information supplied by an unnamed informant² (Affidavit, ¶1).

The informant related that almost one month prior to the date of the affidavit, appellant Mylan had possessed large quantities of Government checks. In support of this allegation, the informant told Crouch that during the first week of May 1976, appellant Mylan drove his car to New York City in order to sell Government checks; that the informant actually saw the serial numbers on two of these checks; and that the informant was present at a sale³ (Affidavit, ¶¶2, 3).

The critical paragraphs of the supporting affidavit state:

(6) On June 1, 1976, the aforesaid informant advised that Robert Mylan would proceed to the Eastern Airlines Shuttle Parking Lot at LaGuardia Airport, Queens, New York, with approximately Two Hundred Eighty Thousand (\$280,000.00) worth of stolen checks, dated on or about May 30 or May 31, 1976,

²Agent Crouch stated that the informant had previously furnished information resulting in the recovery of approximately \$70,000 in stolen securities.

³The informant reported that the serial numbers on the checks were 2834643 and 28348722. The FBI corroborated portions of the informant's statements. Thus, Agent Crouch's affidavit asserted that a check of the records of the New Jersey Division of Motor Vehicles revealed that a green Lincoln bearing New Jersey license plate number 777CYS is registered to Robert E. Mylan (¶4). Further, the communications received from the Secret Service indicated that the Government checks bearing numbers 28348643 [sic] and 28348722 were valid and not payable to Robert Mylan; that the checks were mailed on April 29, 1976, to the payees; and that they were stolen in bulk "either from a central post office facility or at an airport in the Rochester, New York, area" (¶5).

to be sold to the prospective buyer on June 1, 1976 at the aforesaid location. The informant further advised that Robert Mylan would be driving to that location in the previously described 1975 Lincoln bearing New Jersey license plate number 777CYS and that the aforementioned stolen checks would be secreted in that vehicle.

(7) Verification by Agents of the Federal Bureau of Investigation that Robert Mylan was observed on June 1, 1976 driving the above described Lincoln north on the Garden State Parkway toward New York City.

(Appendix C).⁴

Based on the affidavit, Magistrate Catoggio issued a warrant authorizing the search of appellant Mylan's automobile (Document #4 to the Record on Appeal, Appendix B). Pursuant to the warrant, on June 1, 1976, a search of the car was conducted and \$280,000 worth of Treasury checks were discovered in the car.

On July 22, 1976, an indictment was filed charging appellant Mylan and co-defendant John Tarko with conspiring to possess and possessing stolen Government Treasury checks, in violation of 18 U.S.C. §§641, 2.⁵

By notice dated September 2, 1976, appellant Mylan moved to suppress the evidence seized pursuant to the warrant, contending that the affidavit upon which the warrant was based

⁴The FBI also reported that a shipment of Government checks dated May 31, 1976, had been mailed to Rochester, New York, on May 2, 1976.

⁵The indictment is B to the separate appendix to the brief for appellant Mylan.

was insufficient to establish probable cause to search appellant Mylan's car. A hearing was not held on the issue.

The district court denied the motion. In his opinion,⁶ the district judge, relying on Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), found that the affidavit supplied sufficient corroborating information to enable the magistrate to conclude that the informant was credible (Appendix D at 6), and "that the informant was relying 'on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.'" (Appendix D at 7-8.)

On November 22, 1976, appellant Mylan entered a plea of guilty to one count of possessing a stolen Treasury check, preserving for appeal the issues previously raised in the suppression motion. See United States v. Pond, 523 F.2d 210, 212 (2d Cir. 1975); United States v. Faruolo, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

⁶The district court's opinion denying the motion to suppress is reproduced as D to the separate appendix to the brief for appellant Mylan.

ARGUMENT

BECAUSE AGENT CROUCH'S AFFIDAVIT DID NOT DISCLOSE THE BASIS FOR THE INFORMANT'S CONCLUSION THAT STOLEN CHECKS WERE CONCEALED IN APPELLANT MYLAN'S AUTOMOBILE, THE APPLICATION FOR THE SEARCH WARRANT WAS INSUFFICIENT AND THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The warrant authorizing the search of appellant Mylan's automobile was based on an FBI agent's affidavit reporting the tip of an unnamed informant. The tip asserted that on June 1, 1976, appellant Robert E. Mylan would drive to LaGuardia Airport in New York City to sell stolen checks which were hidden in his automobile. The only corroboration of this hearsay information was that on June 1, appellant Mylan was observed driving northward on the New Jersey Garden State Parkway in the direction of New York City. Because the agent's affidavit here failed to explain the basis of the informant's conclusion that Government checks were concealed in appellant Mylan's car, the affidavit did not justify the issuance of a search warrant, and the evidence gained as a result of the ensuing search should have been suppressed. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Since the information contained in the affidavit presented to the magistrate was hearsay, based on an unnamed informant's tip, it was necessary to show not only the general reliability of the informant, but also "the underlying circumstances from

which the informant concluded that the narcotics [here, the stolen checks] were where he claimed they were...." Aguilar v. Texas, supra, 378 U.S. at 114. This requirement enables the magistrate independently to judge the validity of the informant's conclusions. Spinelli v. United States, supra, 393 U.S. at 410; see also United States v. Karanthanos, 531 F.2d 26, 29 (2d Cir.), cert. denied, 96 S.Ct. 3221 (1976); Mapp v. Warden, N.Y. State Corr. Inst., Etc., 531 F.2d 1167, 1171 (2d Cir. 1976); United States v. Rollins, 533 F.2d 160, 165 (2d Cir. 1975), cert. denied, 428 U.S. 978 (1976); United States v. Canestri, 518 F.2d 269, 271-272 (2d Cir. 1975); United States v. Sultan, 463 F.2d 1066, 1068 (2d Cir. 1972); United States v. Alonzo, 447 F.2d 126, 127 (2d Cir. 1971). As the Supreme Court has explained:

Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.

United States v. Ventresca,
380 U.S. 102, 109 (1965).

Here, the affidavit failed to satisfy this requirement, since it is devoid of any showing whatsoever of how or why the informant believed that the stolen checks were stored in appellant Mylan's car. Indeed, it is unclear whether the informant was reporting what he himself knew or what he had learned from other unnamed and uncorroborated sources. While the informant asserted that a month prior to the search he had actually seen two of the stolen checks purportedly possessed by appellant

Myran, this Court has only recently held, in United States v. Karanthanos, supra, that allegations of past criminal activity cannot substitute for the required showing of the way in which the informant gathered the tip -- the very justification for the subsequent search. See also United States v. Harris, 403 U.S. 573, 582 (1971) ("... the inquiry is ... whether the informant's present information is truthful or reliable....") (Burger, Ch.J.) (emphasis in the original).

Moreover, the affidavit here does not provide sufficient corroboration of the key elements of the informant's tip about the events of June 1, 1976, so as to supply a "substantial basis" for crediting the hearsay. See United States v. Harris, supra, 403 U.S. at 581; United States v. Spinelli, supra, 393 U.S. at 416; compare Draper v. United States, 358 U.S. 307 (1959); United States v. Edmonds, 535 F.2d 714, 720 (2d Cir. 1976); United States v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1974); United States v. Acarino, 408 F.2d 512, 515 (2d Cir.), cert. denied, 395 U.S. 961 (1969).

Draper and Edmonds are instructive by comparison. In those cases, the police, through independent investigation, amply corroborated the informant's prediction of when, where, and how the crime was to be committed. Thus, in Draper, the informant related, and police observation confirmed, that Draper would travel from Chicago to Denver by train on the morning of September 9; that Draper would be dressed in a light-colored raincoat, brown slacks, and black shoes; that

he would be carrying a "tan zipper bag;" and that he "habitually 'walked fast.'" Draper v. United States, supra, 358 U.S. at 309. Similarly, in Edmonds, every essential detail of the informant's tip -- that the defendant, accompanied by a female companion, would travel by bus to Norfolk, Virginia, on April 30, 1974 -- was specifically verified by unconnected police investigation.⁷ See also United States v. Canieso, supra, 470 F.2d at 1230.

In comparison, the facts in this case, which were independently corroborated by the FBI, supply neither the specification nor the quantity of details as that required by either Draper or Edmonds. Here, the only specifics verified by police work which might support the informant's tip that a sale of stolen Government checks hidden in appellant Mylan's car would occur on June 1, 1976, at LaGuardia Airport were (1) that appellant Mylan's ownership of the car was reflected by records of the New Jersey Motor Vehicles Bureau, and (2) that, on the particular day in question, appellant Mylan was seen in New Jersey driving in the direction of New York City. However, these circumstances were clearly inadequate to justify a finding of probable cause, see United States v. Brennan, 538 F.2d 711, 720 (5th Cir. 1976) (corroboration of the ownership of an airplane insufficient to justify search of the aircraft), since,

⁷Moreover, the informant in Edmonds clearly indicated that his information derived from personal knowledge. United States v. Edmonds, supra, 535 F.2d at 719-720.

while not inconsistent with the tip, they simply did not, as required, corroborate the specifics of the informant's prediction of how and where the crime would occur.

The failure of the informant to reveal the basis for his conclusion that stolen Government checks were secreted in appellant Mylan's car precludes a finding that probable cause existed for the search.

To infer that the informant reached his conclusion in a reliable manner ... rather than in an unreliable manner ... would be to permit a warrant to issue on the basis of a degree of speculation proscribed by the Aguilar-Spinelli test.

United States v. Karanthanos,
supra, 531 F.2d at 31.

To uphold the search in this case would require this kind of impermissible determination. Accordingly, it was error to deny the motion to suppress the evidence seized, and the judgment of the district court must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for entry of an order suppressing the evidence seized pursuant to the invalid search warrant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 22, 1977

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan Hilbermann